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Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1940

NOS. 381 AND 382

Z. & F. ASSETS REALIZATION CORPORATION, A DELAWARE CORPORATION; AMERICAN-HAWAIIAN STEAMSHIP COMPANY (INTERVENER), PETITIONERS

v.

CORDELL HULL, SECRETARY OF STATE, AND HENRY MORGENTHAU, SECRETARY OF THE TREASURY; LEHIGH VALLEY RAILROAD COMPANY (INTERVENER)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS HULL AND MORGENTHAU

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 295) is reported in 31 F. Supp. 371. The opinion of the United States Court of Appeals for the District of Columbia (R. 335) is reported in 114 F. (2d) 464.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on

June 3, 1940 (R. 354). The petitions for writs of certiorari were filed on August 29, 1940, and granted on October 14, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to enjoin the Secretary of State from certifying, and the Secretary of the Treasury from paying, an award upon the ground that the American Commissioner and the Umpire who rendered the award were without authority to function as the Mixed Claims Commission, United States and Germany.

2. Whether the District Court had jurisdiction to enjoin the Secretary of State from certifying, and the Secretary of the Treasury from paying, an award under the provisions of the Agreement of August 10, 1922, between United States and Germany and under the Settlement of War Claims Act of 1928 upon the ground that the Commission, even though properly constituted, was without authority to make the award.

STATUTES INVOLVED

1. The pertinent provisions of Section 2 of the Settlement of War Claims Act of 1928 (c. 167, 45 Stat. 254) are as follows:

> SEC. 2 (a) The Secretary of State shall, from time to time, certify to the Secretary

of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany * * *.

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.

2. The English text of the Agreement of August 10, 1922, between the United States and Germany (42 Stat. 2200) is set forth in the Appendix, *infra*, pp. 49–52.

3. Section 4 of the Settlement of War Claims Act, creating the German Special Deposit Account and establishing the order of priority of payments out of the fund, is set forth in the Appendix, *infra*, pp. 52–57.

STATEMENT

On August 10, 1922, the United States and Germany entered into an agreement (42 Stat. 2200) providing for the establishment of a Mixed Claims Commission to ascertain and determine the amount to be paid by Germany in satisfaction of its financial obligations to the United States arising out of the first World War.[1] The Agreement provided

[1] The Joint Resolution of July 2, 1921 (42 Stat. 105), which terminated the war between the two countries, reserved to the United States and its nationals all rights, privileges, indemnifications, and damages to which they were entitled under the Treaty of Versailles; and the peace treaty

for the appointment of one Commissioner by the United States, one by Germany, and an umpire to be selected by agreement of the two governments (R. 16) "to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of the proceedings" (R. 17). Article VI declared that "The two Governments may designate agents and counsel who may present oral or written arguments to the commission" and that "The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments" (R. 18).

On March 10, 1928, the Congress enacted the Settlement of War Claims Act of 1928 (45 Stat. 254). The Act provided that twenty percent of the seized property of former German enemy nationals, together with funds contributed by the German government, and a sum appropriated by Congress in respect of claims of the German government on behalf of its nationals, should be paid into a special account, known as the German Special Deposit Account, to be applied to the payment of the awards of the Mixed Claims Commission. The statute authorized the Secretary of State to certify the

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which followed, the Treaty of Berlin, concluded on August 25, 1921 (42 Stat. 1939), secured to the United States the rights reserved under the Joint Resolution. The above-mentioned Agreement of August 10, 1922, between United States and Germany was executed in pursuance of the Treaty of Berlin.

awards of the Commission to the Secretary of the Treasury and directed the latter to make payments in amounts equal to the awards so certified in the manner and order prescribed by the Act. Secs. 2, 4. Provision was made that payments under the Act should not extinguish the liability of Germany for the full satisfaction of all awards (Sec. 2 (b)), and Germany has given bonds to secure payment of all awards (R. 351–352).

In 1927 the Agent of the United States filed claims with the Commission for damages arising out of the destruction of property by reason of explosions at Black Tom, New Jersey, in 1916, and at Kingsland, New Jersey, in 1917 (R. 35.) These claims were dismissed by the Commission in 1930 (R. 35–36, 260–289). Petitions for rehearing were denied on March 30, 1931 (R. 36), and a further petition for a rehearing on the basis of newly discovered evidence was also denied on December 3, 1932 (R. 36).

On May 4, 1933, the American Agent petitioned the Commission to reopen the cases and to grant a rehearing, on the ground that the Commission had been misled in its 1930 decision by "fraudulent, incomplete, collusive and false evidence on the part of witnesses for Germany" (R. 36). The German Ambassador informed the State Department that his government denied the power of the Commission to reopen the cases, saying "The German Government regards the commission as being without authority to pass upon a difference of opinion

which may exist between the two governments in this connection" (R. 124). But the State Department took the position that the question was one for the determination of the Commission (R. 123). The American and German Commissioners disagreed [2] on the question and the Umpire thereupon, on December 15, 1933, rendered a decision upholding the authority of the Commission to vacate its previous decisions (R. 36, 45–59). He concluded that "the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand" (R. 59). An exchange of notes between the two governments during the following year (1934) recognized that these sabotage cases were pending before the Commission (R. 135-137). After extensive hearings, the Commission, on June 3, 1936, rendered a decision, concurred in by the German Commissioner, setting aside its decision of December 3, 1932, which had denied a rehearing (R. 138–140). The decision of June 3, 1936, provided for a hearing limited to the question of whether a rehearing should be granted (R. 96).

[2] Although the Commissioners had in fact disagreed there was absent the usual joint certificate of disagreement, and the Umpire had to decide first whether such actual disagreement was sufficient to give him jurisdiction. He concluded in favor of jurisdiction (R. 50–52).

But notwithstanding the limitation upon the scope of the hearing, the Commission on December 1, 1937, authorized the German Agent to file any evidence he desired, and the cases were apparently fully tried, argued and briefed on the merits by both sides (R. 157–158). And since all of the evidence bearing on the merits had been submitted, the American Agent requested that both questions should be decided without further hearing (R. 97–98). After extensive argument by the Agents of both governments, the Commission, on January 27, 1939, "entered upon its deliberations on the questions presented by the pleadings, briefs and oral argument" (R. 98–99).

In the course of the Commission's deliberations, the American Commissioner and the Umpire both expressed the opinion that, in rendering its decision of October 16, 1930, dismissing the claims, the Commission had been misled by false and fraudulent testimony (R. 60), and, at the request of the German Commissioner (R. 103), the Commission undertook to determine whether the proof of Germany's responsibility was sufficient to justify setting aside that decision (R. 149–150).[3] On March 1, 1939, however, the German Commissioner addressed a note to the Umpire, charging him with bias, declaring that the Commission was proceeding

[3] The German Commissioner had apparently suggested that the Commission investigate whether the United States had affirmatively proved its case, presumably on the theory that it would be unnecessary to grant a rehearing if the United States had not made out a case on the merits.

unfairly in its reconsideration of the claims and advising that he was therefore withdrawing from the Commission (R. 39, 145, 148).

On June 7, 1939, the German Agent was given notice of a meeting of the Commission to be held on June 15, 1939 (R. 99). Thereupon, the German Charge d'Affaires advised the State Department that his government considered the Commission "incompetent to make decisions" because of the withdrawal of the German Commissioner, and added that "the Government of the Reich will ignore the decision to call the meeting on June 15th * * *" (R. 100, 153–154). And the German Agent advised the American Joint Secretary of the Commission "that in view of the note addressed by my Government to the Department of State today, I shall not appear at the meeting" (R. 152–153, 154).

At the meeting of June 15, from which the German Commissioner was absent, the American Commissioner filed a Certificate of Disagreement (R. 154–179), and the Umpire rendered a decision, holding that the retirement of the German Commissioner did not divest the Commission of jurisdiction to dispose of the claims and setting aside the decision of October 16, 1930 (R. 59–62, 179). The American Agent then moved that awards be made in favor of the United States (R. 105–106). The Commission granted the motion and found that the liability of Germany had been established (R. 106). The question of the amount of the

awards was reserved for determination at a subsequent meeting to be held on October 30, 1939, of which the German Agent was given notice (R. 179–180).

Thereafter, on October 3, 1939, the German Chargé d'Affaires again addressed a note (R. 195–216) to the Secretary of State, asserting that the proceedings involved "litigation between two sovereign Governments" (R. 213) and that the Commission was a "rump Commission" without any authority to enter an award (R. 214). The Umpire was repeatedly referred to as the "American" Umpire (e. g., R. 197, 198, 199). The note declared that, while the withdrawal of the German Commissioner did not render the Commission *"functus officio,"* it did deprive the American Commissioner and the Umpire of any authority to exercise the functions of the Commission under the Agreement (R. 198–199); that there was no "disagreement" between the American and the German Commissioners and hence the Umpire was without any justification for rendering a decision (R. 199–203); that the claims on behalf of the Agency of Canadian Car & Foundry Company were beyond the jurisdiction of the Commission because all of the stock of the corporation was owned by a Canadian corporation domiciled in Montreal (R. 207–208); and that the Umpire had erroneously considered and decided not merely the question of reopening the decision of 1930 but set aside that decision and found against Germany (R. 209–214). The note declared that, by reason of these alleged

irregularities, any awards that the American Commissioner and the Umpire might render "can never form the basis for a financial obligation of Germany" (R. 215) and concluded with the statement that "By direction of my Government I therefore raise once more the most emphatic representations against" the alleged illegal acts (R. 215).

In his reply of October 18, 1939, the Secretary of State declined to discuss the issues raised by the German note, and refused to "endeavor, in the slightest manner, to determine the course" of the proceedings of the Commission; he expressed his complete confidence in the American Commissioner and the Umpire, and concluded with the observation that "I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion" (R. 217).

The Commission met on October 30, 1939, the German Commissioner again absenting himself from the meeting, and entered awards in specified amounts in favor of the United States (R. 107, 180, 181, 195). On October 31, 1939, after the filing of this suit, but prior to the service of process on him (R. 311), the respondent Secretary of State certi-

fied the awards to the Secretary of the Treasury (R. 311–312) for payment.[4]

The petitioner in No. 381, Z. & F. Assets Realization Corporation, brought suit to enjoin the Secretary of State from certifying, and the Secretary of the Treasury from paying, the sabotage awards of October 30, 1939 (R. 12), to compel the Secretary of the Treasury to pay over the balance of the German Special Deposit Account to petitioner and others similarly situated (R. 12), and for a declaratory judgment that the sabotage awards were invalid (R. 12). The complaint (R. 1–12) alleged that the petitioner was a claimant under a prior award of the Commission (R. 2–3), that the funds remaining in the German Special Deposit Account were insufficient to pay all of the claims[5] (R. 8), that Germany has been in arrears of payments for many years under the Debt Funding Agreement of June 1930, and that there is no way

[4] It is not clear from the record whether the Secretary of State accepted the judgment of the Umpire as his own or concluded that questions with respect to the Commission's jurisdiction and procedure were for the Commission to decide (R. 123, 217). It is clear, however, that during the years 1933 to 1939 the Secretary and the Department of State had fully considered the views of the German Government, of the German Commissioner, and of the petitioner in No. 381 itself as to the proceedings of the Commission and the validity of the awards (R. 123–4, 135–7, 150, 195, 216–7, 291, 305–311, 313–317).

[5] The total principal amount of awards to petitioner Z & F Assets Realization Corporation is $839,998.40, and this petitioner has already been paid an amount in excess thereof, namely, $864,050 (R. 111). Petitioner American-

of compelling Germany to make said payments (R. 8–9). The complaint further alleged that the sabotage awards were void, for the reason that the American Commissioner and the Umpire were without authority to function as the Commission (R. 6–7), that, even if properly constituted, the Commission was without authority to reopen the decision of 1930 dismissing the sabotage claims (R. 9), and that one of the awards in favor of a domestic corporation was void for the reason that the capital stock of the beneficiary of the award was wholly owned by a Canadian corporation (R. 9–11). The American-Hawaiian Steamship Company, the petitioner in No. 382, filed a bill of intervention setting forth substantially identical allegations (R. 31–32).

Hawaiian Steamship Company has awards in the aggregate principal amount of $3,044,125.00, and it has received payments in the amount of $3,309,906.69 (R. 75). Moreover, every holder of awards except the sabotage claimants have received "payment in full of their claims, together with interest to date of payment, or amounts equal to not less than approximately 100% of the principal amount of such awards." "In the great majority of cases said holders of awards remaining unpaid have received more than the principal amount of said awards" (R. 111). In many, if not all, instances, payments received by awardholders have been designated as part principal and part interest. But regardless of the designation, it has been settled, at least for income-tax purposes, that all amounts received must be treated as principal until the principal amount has been fully paid. *Helvering* v. *Drier*, 79 F. (2d) 501 (C. C. A. 4th); *Drier* v. *Helvering*, 72 F. (2d) 76 (App. D. C.); *Commissioner* v. *Speyer*, 77 F. (2d) 824 (C. C. A. 2d), certiorari denied, 296 U. S. 631; *Commissioner* v. *Ullmann*, 77 F. (2d) 827 (C. C. A. 2d), certiorari denied, 296 U. S. 631.

The respondents Hull and Morgenthau moved to dismiss the complaint and bill of intervention upon the ground that the questions presented were political in character and not subject to judicial cognizance (R. 294–295). The respondent Lehigh Valley Railroad Company, a claimant under the sabotage awards, intervened and filed an answer to the complaint and bill of intervention, together with a cross-claim for payment against the respondent Morgenthau (R. 33–44). The respondent intervener also moved for a summary judgment dismissing the complaint and bill of intervention and granting the relief prayed for in its cross-claim (R. 44, 76).

The District Court granted the motion to dismiss (R. 299) upon the ground that the question whether the claims were properly allowed "was a question to be raised by the United States and not by individuals who might be wronged by the action of the Commission" (R. 297). Judgment on the cross-claim was reserved (R. 299). On appeal, the Court of Appeals held that the questions presented were political and beyond the jurisdiction of the courts (R. 336–354). It therefore affirmed the judgment of the District Court (R. 354).

SUMMARY OF ARGUMENT

I

Since foreign governments are immune from unconsented suit, the claims of American nationals

against Germany must be settled through diplomatic channels. The immunity of foreign sovereigns is complete and extends even to property of such governments within the territorial jurisdiction of our courts. The doctrine of immunity is thus a recognition of the principle that such controversies should be settled by political and not by judicial means.

The executive department was at liberty to present the claims of American nationals or not in its sole discretion. And by espousing the claims the Government made them its own. The funds retained or received from Germany in payment of the claims are likewise the property of the United States until payment is made to the private claimants. The Government may be under a "moral" obligation to make payment, but no private individual has any legal or equitable interest in the funds until payment to the claimant. Such is the settled doctrine as to the respective interests of the Government and private claimants under treaties identical in character with the Agreement of August 10, 1922.

Apart from statute, therefore, the executive department, acting through the Secretary of State, may accept or reject an award in its sole discretion until payment has been made to the private claimant. The action of the Secretary involves the conduct of our foreign affairs, entrusted by the Constitution to the executive department, and his action cannot therefore be reviewed in the courts unless the Congress has expressly so provided.

While the courts may exercise an "antagonistic jurisdiction" where private rights are involved, no such rights are here involved apart from statute. The cases sustaining the power of the courts to determine the issue of ownership of the claim as between private persons after the Government has made payment to a claimant expressly recognize the conclusive effect of the decision of the political department on the question of the validity of the award.

In brief, the Secretary of State had authority even in the absence of a statutory grant to determine the validity of the sabotage claims against Germany. The authority of the Secretary is in no way dependent on the nature of the objection to the award, and extends to the disposition of all questions going to the validity of the award, whether they involve the merits of the claims or the "jurisdiction" of the Commission or Umpire. In practice this authority has been exercised for almost one hundred and fifty years. And, in principle, it can make no difference what the ground of the objection to the award may be. To overturn the decision of the Secretary in rejecting an award is to precipitate a controversy with a foreign power which the courts are powerless to settle. To reverse an acceptance of an award is to place a grave restriction on the authority of the executive department to conduct foreign affairs, a restriction from which all other sovereign nations are free.

The Settlement of War Claims Act does not purport to restrict in any way the power which the Secretary of State would otherwise enjoy to accept or reject the sabotage awards. The sole purpose of the Act in this aspect was to make provision for the deposit of the funds held for payment of awards, and to establish a method of payment after all political questions affecting the validity of the award had been settled by the certificate of the Secretary of State. The courts have power to adjudicate the ownership of the claim as between private persons; on this question the State Department has never purported to pass. But the courts may not review the decision of the Secretary of State on the validity of the award—a political question.

II

If it be assumed that the executive department has otherwise no authority to determine the validity of the sabotage awards apart from statute, the Settlement of War Claims Act should be construed to confer such authority. Since the funds in the German Special Deposit Account are the property of the United States, Congress undoubtedly has constitutional power to commit final determination to an executive agency. Such, we submit, must be deemed the intention of Congress.

The Congress could not have intended that all controversies arising between the two Governments should be resolved in the first instance by the courts. Either the Congress intended that the decision of the Commission or Umpire should be

conclusive on all issues, or that the Secretary should have power to decide any question arising between the two Governments with respect to a claim submitted to the Commission. And since Congress made no provision for judicial review, in either view the courts may not reexamine the question of the validity of the sabotage awards.

ARGUMENT

I

THE QUESTION OF THE VALIDITY OF THE SABOTAGE AWARDS IS OF A POLITICAL CHARACTER, IS CONCLUSIVELY DETERMINED BY THE CERTIFICATE OF THE SECRETARY OF STATE, AND IS NOT OPEN TO JUDICIAL INQUIRY

The petitioners contend that, under the provisions of the Settlement of War Claims Act, private persons claiming under a valid award have a property interest in the funds in the German Special Deposit Account, that the courts have jurisdiction to construe treaty provisions whenever private rights are involved, and that the courts may, therefore, determine whether the Umpire and the American Commissioner had power under the Agreement of August 10, 1922, to function as the Commission and render the awards. It is further contended that the payment of the sabotage awards would deplete the funds available for the payment of the awards in which petitioners are interested, and that therefore they are entitled to equitable relief.

The petitioners' contentions are without substance.

In submitting the claims of its nationals against Germany to the Mixed Claims Commission, the United States made the claims its own, and the funds retained by the United States or received from Germany in satisfaction of the awards of the commission are the property of the United States. The Government is under no legal or equitable duty to distribute such funds, whatever may be its moral obligation to do so. The differences between the United States and Germany as to the validity of the sabotage awards, therefore, involve political questions and the decision of the executive department with respect to such questions is conclusive, and is not subject to judicial review. Apart from statute, private claimants have no legal or equitable right to compel payment, and the Settlement of War Claims Act, in authorizing the Secretary of the Treasury to pay awards certified by the Secretary of State, recognizes and confirms the authority of the executive department to determine conclusively the validity of the awards.

A. APART FROM STATUTE, THE QUESTION OF THE VALIDITY OF THE SABOTAGE AWARDS IS FOR THE EXCLUSIVE DETERMINATION OF THE EXECUTIVE DEPARTMENT

1. The claims of American nationals against Germany presented to the Commission are the claims of the United States, and funds held by the United States for the payment of awards are the property of the United States until paid to the private claimants

Since foreign governments are not subject to unconsented suit, the claims of American nationals

against such governments may be prosecuted "not by suit in the courts, as of right, but by diplomacy, or, if need be, by war" *United States* v. *Diekelman*, 92 U. S. 520, 524; *Frelinghuysen* v. *Key*, 110 U. S. 63, 72; *Boynton* v. *Blaine*, 139 U. S. 306, 323; *Gardner* v. *Clarke*, 9 Mackey (D. C.) 261, 264; *Wolfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 376. The immunity of a foreign sovereign from suit, it should be observed, does not rest on want of judicial power alone. For reasons of comity, the courts of one country decline to entertain proceedings against foreign sovereigns even where the person or property of such sovereign is found within the territorial jurisdiction of the domestic court. *The Exchange*, 7 Cranch 116; *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2d); *The Parlement Belge* [1880], 5 P. D. 197; *Duke of Brunswick* v. *King of Hanover* [1844], 6 Beav. 1, 37, 38; see Hayes, *Private Claims Against Foreign Sovereigns*, 38 Harv. L. Rev. 599. The courts will exercise jurisdiction of an action involving a claim on behalf of a national of one sovereign against another nation only with the consent of the governments. *Cf. United States* v. *Diekelman*, 92 U. S. 520, 524; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 455–463. The immunity of the foreign sovereign thus reflects the conclusion that "the controversy is more properly settled by diplomacy, or international courts or

war." Jaffe, *Judicial Aspects of Foreign Relations* (1933), p. 51.

The Government in its discretion may agree or refuse to espouse the claim of its nationals. *Holzendorf* v. *Hay*, 20 App. D. C. 576, 580. And when the United States "assumed the responsibility" of presenting to the Commission the claims of its nationals against Germany, it made the claims "its own." *Boynton* v. *Blaine*, supra, at 323; *Great Western Ins. Co.* v. *United States*, 19 C. Cls. 206, 217–218, aff'd on other grounds, 112 U. S. 193; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 356–357. Such has been the "consistent doctrine" of the State Department in presenting a claim of an American national to any other government. See Opinion of the Solicitor of the Department of State, *Distribution of Alsop Award*, p. 14.

The *Frelinghuysen* and *Boynton* cases involved the Convention between the United States and Mexico, of July 4, 1868, 15 Stat. 679, which provided for the establishment of a mixed claims commission to pass upon and make individual awards in respect of claims presented on behalf of private claimants, required the commission "to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective governments in support of or in answer to any claims, and to hear, if required, one person on each side on behalf of each government on each

and every separate claim", and to render decisions "upon such evidence or information only as shall be furnished by or on behalf of their respective governments." The pertinent provisions of the Agreement of August 10, 1922, are substantially identical. Under the agreement, the Commission was authorized to consider claims presented on behalf of American nationals (Art. I, Appendix, *infra*, pp. 49–50). The Agreement provided, moreover, that the "two Governments" were to designate agents and counsel to present arguments, required the commission to consider papers "presented to it by or on behalf of the respective Governments in support of or in answer to any claims" (Art. VI, *infra*, p. 51), and declared that the decisions of the commission and of the Umpire were to be "final and binding upon the two Governments" (Art. VI, *infra*, pp. 51–52).

Since questions may arise between the two governments as to the validity and propriety of a claim even after payment has been received by the United States, the claim of American nationals remains that of the Government, and the funds retained or received by the United States in payment are the property of the United States until payment is made to the private claimants. *Williams* v. *Heard*, 140 U. S. 529, 537–538; *Great Western Ins. Co.* v. *United States, supra; Rustomjee* v. *The Queen*, L. R. 1 Q. B. 487 (1876), 2 Q. B. 69 (1876); Opinion of the Solicitor, *Distribution of Alsop Award, supra*, p. 15; Borchard,

supra, p. 383. Although the United States is under a "moral obligation" to make payment, "no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund." *Williams* v. *Heard, loc. cit. supra; Boynton* v. *Blaine, supra,* at 323.

The interest of private claimants is limited to "a possibility of their payment by Congress—an expectancy of interest in the fund, that is, a possibility coupled with an interest." *Williams* v. *Heard, loc. cit. supra.* This "possibility", it is true, is a property right as between private individuals, may be assigned, passes to the estate in bankruptcy, and the equitable owner may recover in the courts from a private person to whom the Government has made payment. *Comegys* v. *Vasse,* 1 Pet. 193; *Williams* v. *Heard, supra.* See also *Judson* v. *Corcoran,* 17 How. 611; *Frevall* v. *Bache,* 14 Pet. 95; *Phelps* v. *McDonald,* 99 U. S. 298. These cases, however, do not aid petitioners. In such cases, as this Court pointed out in *Frelinghuysen* v. *Key, supra,* at 73, the fund had passed to private individuals in payment of the awards.

2. Apart from statute, the Secretary of State may accept or reject the sabotage awards in his sole discretion until payment is ultimately made to the private claimants

In presenting the claims of its nationals against Germany, the executive department enjoyed unlim-

ited discretion to settle, compromise, release, or abandon any or all of the claims.[6] See Borchard, *supra,* pp. 366–380. The executive department was free to accept in full satisfaction any sum or diplomatic adjustment which it might deem reasonable (*cf. Great Western Ins. Co.* v. *United States,* 19 C. Cls. 206, 218, 112 U. S. 193, 197–198; *Houard's Case against Spain,* Moore's International Arbitrations, p. 2428), or release the claims of American nationals in exchange for a release of claims of a foreign government on behalf of its nationals against the United States (*McLeod's Case against the United States,* Moore's Arbitrations, p. 2419; cf. treaties cited in Borchard, *supra,* p. 374, Note 1),[7] or aban-

[6] Indeed, the very claims here in litigation were the subject of extended negotiations looking towards a settlement. "Protracted efforts commencing in 1924 to dispose of the so-called sabotage claims by way of settlement were made and several tentative offers of settlement involving the payment of very substantial sums were put forward by the then German Agent * * *." (Affidavit of Harold H. Martin, R. 82.) And shortly after the unanimous decision of the Commission on June 3, 1936, setting aside its 1932 order denying a rehearing, there was an adjournment and delay of over a year obtained at the request of the German Agent during which settlement negotiations were unsuccessfully conducted (R. 96, 141–142).

[7] Whether the United States incurs a legal liability to its nationals as a result of releasing their claims in exchange for release of claims against the United States, has never been decided by this Court. The Court of Claims held the United States liable in *Gray, Adm'r* v. *United States,* 21 C. Cls. 340, 390–393 (French Spoliation cases); *Cushing, Adm'r,* v. *United States,* 22 C. Cls. 1, 31 (same). In *Blagge* v. *Balch,* 162 U. S. 439, however, this Court adverted to the fact that

don any claim which, in its judgment, should not be pressed. *Cf. Frelinghuysen* v. *Key, supra;* Report of Secretary of State Bayard on *Lazare and Pelletier claims against Hayti,* Sen. Ex. Doc. No. 64, 49th Cong., 2d Sess.; Sen. Ex. Doc. No. 52, 43d Cong., 1st Sess. (*Brig Caroline,* claim against Brazil); Moore's Arbitrations, 1361, 1396, *et seq.* (certain claims against Colombia).[8]

Such is the conclusion indicated by precedent and practice. Such, we submit, is the conclusion required on principle. Since a claim against a foreign sovereign must be settled by diplomacy, the presentation of the claim involves the conduct of our foreign relations, entrusted by the Constitution, to the political departments, and the action of these departments in the conduct of foreign affairs is not subject to judicial review. Cf. *Boynton* v. *Blaine, supra,* at 323–325; *Oetjen* v. *Central*

Congress had disagreed with the Court of Claims and had not permitted the proceedings to go to judgment (*id.* at 459) and held that payments appropriated for the benefit of American claimants whose claims had been released were made "as of grace and not of right" (457). No such question could arise with respect to petitioners' claims, since they have never been released by the Government, and the Government incurs no liability by reason of inability to enforce them.

[8] Attorney General Hoar ruled (13 Op. Atty. Gen. 19) with respect to one of these claims that the United States could not resubmit a claim of an American national to a new commission after an award by the old. This opinion is in conflict with all other authorities and is undoubtedly erroneous. See Borchard, *supra,* p. 382, Note 2. Compare *Frelinghuysen* v. *Key, supra,* at 73.

Leather Co., 246 U. S. 297, 302; *Terlinden* v. *Ames*, 184 U. S. 270, 288; *Jones* v. *United States*, 137 U. S. 202, 212; *Doe* v. *Braden*, 16 How. 635; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420; *Foster* v. *Neilson*, 2 Pet. 253, 313, 314; *Charlton* v. *Kelly*, 229 U. S. 447, 469–476; *Compania Espanola* v. *Navemar*, 303 U. S. 68, 74; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137–139. The principle is founded on the obvious consideration that the exercise of an "antagonistic jurisdiction" by the courts would embarrass the Government and undermine its position in the conduct of its foreign relations. *United States* v. *Lee*, 106 U. S. 196, 209. It is true, as petitioners assert, that an exception has been made where private rights are involved. It is unnecessary to inquire to what extent the conclusion is assumed in the premise of the exception. For, as previously observed, the courts have recognized that claims against foreign sovereigns can best be settled by diplomacy and have accordingly held that claims espoused by the United States are claims of the Government and the funds received from a foreign government in payment are the property of the United States until paid to the claimant. In short, in the language of the exception, no private rights are involved until payment to the claimant.

The executive department may therefore accept or reject any award of the Commission unless its

authority is restricted by statute, and this power may be exercised even after payment has been made to the United States. The power to reject in these circumstances is settled by the decisions of this Court in *Frelinghuysen* v. *Key, supra,* and *Boynton* v. *Blaine, supra.* In these cases reconsideration of the propriety of the Weil and La Abra awards against Mexico under the Convention of July 4, 1868, had been specifically authorized by the Act of June 18, 1878, 20 Stat. 144. But the decisions were expressly rested on the broad ground that the rejection of an award is a matter committed to the determination of the executive department, and that Congressional authorization was unnecessary. *Frelinghuysen* v. *Key, supra,* at 74; *Boynton* v. *Blaine, supra,* at 322–323. The congressional authorization to reconsider, the Court concluded, amounted only to a "request", and the executive department's power to withhold payment after an award and receipt of funds from the foreign government was the same "without this request as with it". *Frelinghuysen* v. *Key, supra,* at 74. Moreover, the State Department has in other instances exercised its power to reject awards without statutory authority. See *Brig Caroline* and *Pelletier* cases, *supra.*

The decision of the executive department to accept an award is equally conclusive. See *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 460; *cf. Hubbel et al.* v. *United States,* 15 C. Cls. 546 (The Caldera Cases), affirmed by an equally divided

court, 16 C. Cls. 635 (not reported in official United States Reports).[9] Since a private claimant has no legal or equitable right to payment, he cannot object to the depletion of the fund available for the payment of his claim. And the questions involved are political in character whether the executive department rejects or accepts an award. To overturn a rejection in a judicial proceeding is to precipitate a controversy with a foreign government which the courts are powerless to settle. To overturn an acceptance is not necessarily fraught with such danger, but "Obviously, it would not do for the courts to declare that an act is a breach of a treaty and results in this or that remedy. The remedy accorded might not content the foreign power or might bring about a conflict between the executive and judicial branches of our own government." *George E. Warren Corp.* v. *United States*, 94 F. (2d) 597, 599 (C. C. A. 2d), certiorari denied, 304 U. S. 572. The fundamental objection to the exercise of an "an-

[9] In the *Caldera* cases, the Court of Claims held, under a jurisdictional act authorizing the court to hear and determine certain claims to payment out of the Chinese Indemnity fund "according to the principles of justice and international law," that the espousal by the Government of the petitioner's claim must be accepted by the courts as conclusive of its validity. The court did not suggest, of course, that the executive department could not change its position at any time (*cf.* Borchard, *supra*, p. 383), but found that the Government had consistently supported the petitioner's claim at all times.

tagonistic jurisdiction" in the case of an acceptance, however, is that it would subject the executive department to a grave restriction in its authority to settle and compromise claims (see *supra*, pp. 23–24) from which all other governments are free. "In its international relations", this Court has held, "the United States is as competent as other nations to enter into such negotiations, and to become a party to such conventions, without any disadvantage due to limitation of its sovereign power, unless that limitation is necessarily found to be imposed by its own Constitution." *Burnet* v. *Brooks*, 288 U. S. 378, 400.

Nor does the power of the executive department to accept or reject an award depend in any way upon the nature of the objection made to the award. The reason for suspending payment of the La Abra Silver Mining Company claim was the suggestion advanced by Mexico that the claim was tainted with fraud. But the executive department is at liberty to accept or reject an award whatever the basis of objection may be. The private claimant has no legal or equitable right to receive payment or to prevent depletion of the fund available for payment, whatever may be the alleged merits of the claim or the jurisdiction of the commission. And the danger that judicial review may embarrass the Government and undermine its position in the conduct of foreign affairs is likewise the same whatever the character of the claims or the nature

of the proceedings of the commission or its members in rendering the award. The executive department must be permitted to abandon or assert a claim whenever, in its judgment, the public interest and international relations require. See Borchard, *supra*, p. 373.

The State Department has uniformly acted upon this basis. From the time of the Jay treaty of 1794 to the present date, controversies between the United States and a foreign power as to the jurisdiction of a commission or umpire appointed to arbitrate disputes between the two nations have been settled by negotiations between the diplomatic representatives of the respective governments. The claim of the British commissioners of authority to withdraw from the commission established by the Jay treaty and thus to prevent the commission from functioning was settled in this manner. Moore's Arbitrations, pp. 321–324; Moore's Digest VII, p. 33. In the case of the decision of the King of the Netherlands, appointed by a convention of September 29, 1827, to arbitrate a boundary dispute between the United States and Great Britain, the United States protested on jurisdictional grounds, but President Jackson was inclined to accept the award and apparently submitted the issue to the Senate (which rejected the decision) only because of the objections of the States of Maine and Massachusetts (Moore's Digest VII, pp. 59–60). In Pelletier's

case against Haiti the Secretary of State concluded that the arbitrator had too narrowly construed his jurisdiction in refusing to consider certain objections to the claim, and refused the award. Sen. Ex. Doc. No. 64, 49th Cong. 2d Sess. In the case of claims on behalf of certain nationals against Colombia, the Secretary of State agreed to resubmit the claims to a new commission after objection had been made to the original awards by Colombia on jurisdictional grounds. Moore's Arbitrations, pp. 1361 and particularly 1396 *et seq.* In the Orinoco Steamship Co. case against Venezuela, the protest to the United States that the umpire had exceeded his jurisdiction was submitted for arbitration to the Permanent Court of Arbitration for The Hague. See Wilson, *Hague Arbitration Cases* (1915), pp. 206–214; 5 Am. J. Int. L. 230. The United States protested on jurisdictional grounds that the decision with respect to a boundary dispute between the United States and Mexico, involving the Chamizal tract, the United States offered to settle the dispute by further negotiations, but nothing came of this suggestion due to internal trouble in Mexico. *Foreign Relations,* 1911, pp. 598–605. In some cases the United States has insisted that the question of the commission's jurisdiction is for the commission to decide (Moore's Digest VII, pp. 31–35; Moore's Arbitrations, pp 1241, 2599–2600); in

others, as appears from the foregoing discussion, this Government has protested on jurisdictional grounds and suggested reconsideration; and in others, it has agreed to reconsider an award because of jurisdictional objections advanced by the other government. Whatever the merits of the Government's position in any of these cases, however, it seems obvious, as the petitioner in No. 382 appears to recognize (Br. 27), that such questions must be settled by diplomacy.

The decision of this Court in *Comegys* v. *Vasse*, 1 Pet. 193, does not aid petitioners. In that case the Court held that the decision of the domestic commission, established to pass upon private claims against Spain which the United States by treaty had agreed to assume, was conclusive on the question of the validity of the claim, but that the commission, having been given no power to subpoena witnesses, was not intended to pass upon the question of the ownership of the claim as between private individuals. In the course of its opinion, this Court observed that it was "wholly immaterial" to the domestic commission who was the original claimant and who the equitable owner in order to determine the liability of Spain, and construed the treaty to limit the jurisdiction of the commission to the determination of the validity of the claims against Spain and to withhold authority to pass on the issue of the ownership of the claim as between private individuals.

In the *Comegys* case, however, all differences between Spain and the United States had been settled by the treaty, and the power of the domestic commission was limited to that expressly conferred by the treaty (8 Stat. 252, 260) and the implementing act (3 Stat. 637, 639). The executive department, on the contrary, has such power in the conduct of foreign relations as has not been withdrawn by statute. Moreover, the function of the domestic commission was to distribute funds appropriated by Congress after all political issues between the United States and Spain had been settled by treaty and provision was made for payment without any action of the Secretary of State (8 Stat. 252, 260).[10]

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[10] The Congress has in some cases established a domestic commission to pass upon claims to be paid out of a fixed lump sum paid or agreed to be paid by a foreign government in satisfaction of all claims, and has directed the Secretary of State to certify a "list" of the claims approved by the commission to the Secretary of the Treasury for payment. See, e. g., Act of June 23, 1874, 18 Stat. 245, 248 (Alabama claims); Act of April 10, 1935, 49 Stat. 149 (Mexican claims). In such cases, the commission's determination of the validity of the claims may involve political questions since the United States may return any excess not found to be due on account of claims of American nationals. See Borchard, *supra*, p. 375, n. 4. Whether such statutes restrict the power which the Secretary of State would otherwise enjoy is considered below in connection with the discussion of the Settlement of War Claims Act. See *infra*, p. 33, *et seq.*

B. THE AUTHORITY OF THE SECRETARY OF STATE TO ACCEPT OR REJECT THE SABOTAGE AWARDS IN HIS SOLE DISCRETION IS RECOGNIZED AND CONFIRMED IN THE SETTLEMENT OF WAR CLAIMS ACT

The petitioners contend that they have a property right in the Special Deposit funds by virtue of the provisions of the Settlement of War Claims Act, and that the courts may construe the provisions of the Agreement of August 10, 1922, in order to protect and enforce their private rights (Br. of Petitioners in No. 381, pp. 20–29).

The answer is that, under the Act, the Secretary of State may accept or reject an award in his sole discretion and, whatever the right of petitioners to compel payment of awards in which they are interested, the limit of the Secretary of the Treasury's duty is to pay the awards certified as such by the Secretary of State.

Paragraphs (a) and (b) of Section 2, invoked by petitioners, are very similar in terms and were undoubtedly modeled after the Act of February 26, 1896, c. 34, 29 Stat. 28, 32. That Act provides:

> Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury.
>
> The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the cer-

tificates of the Secretary of State, pay the amounts so found to be due.

Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for.

The 1896 enactment was passed at the suggestion of the Secretary of State and its sole purpose and effect was to make provision for the deposit of funds received from foreign governments in payment of claims of American nationals. See 28 Cong. Rec. 1058, 54th Cong., 1st Sess. Prior thereto, where payment was withheld for some reason, and where the funds had been deposited by the Secretary in private banks, the increment of interest earned had been the subject of litigation. See *Angarica* v. *Bayard,* 127 U. S. 251. The statute was plainly not intended to modify the pre-existing authority of the Secretary of State to make conclusive determination of any question affecting the liability of foreign governments to the United States. See Borchard, *supra,* pp. 388–392.

The provisions of Sections 2 (a) and 2 (b) of the Settlement of War Claims Act are equally limited in purpose and effect. It cannot seriously be suggested that Congress intended to overturn the settled practice in the disposition of claims of American nationals against foreign sovereigns. The contention of petitioners that the Congress intended to reduce the Secretary to the status of an

automaton with duties limited to the ministerial function of certifying the authenticity of an award is plainly specious. The argument, if sound, would require the Secretary to accept any award made by the Commission in the exercise of its "proper" jurisdiction, even though subsequent investigation should prove that the claim was without merit, and that, in the interest of justice and the maintenance of good relations with a foreign government, the United States should reject the award. To be sure, the statute speaks of an "award" of the "Commission," and the text permits of a distinction between an award based on an inequitable claim but rendered by the "properly constituted" commission acting within its "proper" jurisdiction and one rendered by persons without authority under the Agreement to function as the commission or based on a claim beyond the scope of the commission's authority under the treaty. But the statute must be read against the background of practice and history, and when so construed, the distinction, as we have shown, is without a legal difference.[11]

[11] The petitioners argue from other statutes directing the Secretary of State to certify a "list" of claims approved by a *domestic* commission established to distribute a fixed lump sum paid or promised to be paid to the United States that the Secretary's duty was intended to be purely ministerial in such cases (Brief of Petitioner in No. 381, pp. 41–42) and hence was intended to be the same in this statute. It is by no means clear in such cases, despite the language of the statutes re-

The Government's position is fully sustained by the decisions of this Court. In *Frelinghuysen* v. *Key*, 110 U. S. 63, this Court held that a statute directing the Secretary of State to distribute the funds received in payment of awards against Mexico did not restrict the power otherwise possessed by the executive department to withhold payment pending consideration of a suggestion from Mexico that the claim was tainted with fraud. The statute in question provided (Act of June 18, 1878, c. 262, 20 Stat. 144, Sec. 1):

> That the Secretary of State be, and he is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims, * * * and whenever, and as often as, any installments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among

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ferred to, that Congress intended so to restrict the Secretary's power, since the foreign state may still have an interest in the return of any possible excess, which may suggest that Congress intended to leave to the Secretary discretion to negotiate with the foreign Government with respect to any of the claims. Whatever may be the conclusion as to the statutes dealing with such domestic commissions, however, it is obvious that in this case the liability of Germany was not settled by the Agreement of August 10, 1922, and Congress could not have intended to withdraw from the Secretary of State power to dispose of such political questions at least until after certification.

> the corporations, companies, or private individuals respectively in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. * * *

An action was brought by the assignee of an award-holder for mandamus to compel the Secretary of State to pay the award, which was being withheld to investigate charges of fraud. The Court declined to compel payment and observed (110 U. S., at 73–74):

> The first section of the act of 1878 authorizes and requires the Secretary of State to receive the moneys paid by Mexico under the convention, and to distribute them among the several claimants, but it manifests no disposition on the part of Congress to encroach on the power of the President and Senate to conclude another treaty with Mexico in respect to any or even all the claims allowed by the commission, if in their opinion the honor of the United States should demand it. At most, it only provides for receiving and distributing the sums paid without a protest or reservation, such as, in the opinion of the President, is entitled to further consideration. It does not under-

take to set any new limits on the powers of the Executive.

The Act of June 18, 1878, it is true, contained a specific request to the President (Sec. 5) to withhold the award on which suit was being brought. But the Court expressly noted that the President could have instituted the same inquiry prior to payment "without this request as with it" (Id. at 74). These views were reaffirmed in *Boynton* v. *Blaine,* 139 U. S. 306, 322–323, a subsequent proceeding to compel payment after the Senate had rejected a treaty providing for the resubmission of the claim. See also *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 458–460; *Alling* v. *United States,* 114 U. S. 562, 564; Cf. Borchard, *supra,* pp. 389–390; Opinion of the Solicitor, *Distribution of Alsop Award, supra,* pp. 42–43. The objection to the *La Abra* award, it is true, went to its merits, but the distinction between such questions and "jurisdictional" issues is without a legal difference, as we have shown. The Act makes no provision for the settlement of differences between the two Governments with respect to the "jurisdiction" of the Commission and Congress undoubtedly intended to leave with the executive department the power which it had theretofore enjoyed to settle such controversies by diplomacy.

The petitioners appear to suggest that, in certifying the sabotage awards, the Secretary of State did not purport to pass upon the question whether

the Umpire and the American Commissioner were authorized by the Agreement to function as the Commission and, if so, whether the Commission had "jurisdiction" to enter the awards. It may be assumed for purposes of argument that the Secretary did not undertake to make an independent determination of these questions. It is perfectly clear, however, that, in response to the protests of the German diplomatic representatives beginning in 1933, the Secretary construed the treaty to authorize the Commission and the Umpire to determine such questions. And since it cannot be doubted that the two Governments had power to submit such questions to the Commission and the Umpire, the decision of the Secretary with respect to these issues stands upon the same footing as a determination that a particular claim is within the jurisdiction of the Commission.

It may be admitted that the Secretary of the Treasury, in some circumstances, may be compelled by judicial process to pay the amount of a certified award to the claimant named therein or to the person who has been adjudged, as against the named claimant, to be the equitable owner of the award.[12] *Mellon* v. *Orinoco Iron Co.*, 266 U. S.

[12] See, however, Section 2 (g) of the Act, which provides that "Payment shall be made only to the person on behalf of whom the award was made," except in specified instances. Cf. *Blagge* v. *Balch*, 162 U. S. 439. See also Sec. 4 (5).

121, cited by petitioners, so holds. But, irrespective of the duty of the Secretary of the Treasury, in such circumstances, the case obviously does not aid the petitioners in their present endeavor to overthrow the certification issued by the Secretary of State. Unlike the situation in instant cases, the validity of the award in the *Orinoco* case was not in question. The sole issue in that case was the ownership as between private litigants of a specified fund received by the United States from Venezuela under an award certified by the State Department. The Secretary of State had made no attempt to adjudge the respective rights of the competing claimants. He simply declared that, "in accordance with the uniform rule and practice of the Department" any new claimants who seek to enforce rights alleged to be derived from the award-holders (by the way of assignment or otherwise) are "remitted to the courts for the enforcement of the rights of which they consider themselves possessed * * *" (266 U. S. at 124). The Secretary thus expressly recognized the distinction, drawn in *Comegys* v. *Vasse, supra,* between the validity of the award, a political question, and the ownership of the claim as between private individuals, a nonpolitical question appropriate for judicial determination. Thus, the action challenged neither a decision as to the basic ownership of the claim nor the certification of the award itself, and the Court was not asked to overturn a determination of the Secretary of State. Rather, an

assumption that the award as certified was valid, and hence susceptible of payment, was the foundation of the cause of action.[13] The cases at bar, on the contrary, are prosecuted neither by persons named in the sabotage awards nor by persons who assert an equitable right, as against the named claimants, to the payment of the awards as certified. Instead, the foundation of petitioners' case is the alleged invalidity of the awards as certified. This raises an issue, not involved in the *Orinoco* case, upon which the decision of the Executive branch is conclusive.

The case of *Perkins* v. *Elg,* 307 U. S. 325, does not aid petitioners. In that case this Court held that the Secretary of State could be joined in that part of the decree which granted a declaratory judgment that plaintiff was a citizen, although the Secretary could not be compelled by mandamus to grant the plaintiff a passport. The issue of citizenship, however, has not and probably cannot be committed to the exclusive determination of the

[13] The decision in the *Orinoco* case was based upon the Court's prior ruling in *Houston* v. *Ormes*, 252 U. S. 469, 473, that where Congress has appropriated a fund for payment to a specified claimant, one who has an equitable interest in the fund as against the person so named may enjoin the Secretary of the Treasury from making payment to such person. See 266 U. S. at 125–6. And the decision in the *Houston* case, in turn, proceeds on the view that, since the Secretary was under a ministerial duty to pay the person named by Congress which could be enforced by mandate, the suit against the Secretary was a "convenient" method of settling a controversy between the private persons. 252 U. S. at 473.

Secretary of State. Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276; *Crowell* v. *Benson*, 285 U. S. 22, 60; See dissenting opinion of Mr. Justice Brandeis in same case, p. 90.

II

IRRESPECTIVE OF THE POLITICAL NATURE OF THE INQUIRY, CERTIFICATION OF THE SABOTAGE AWARDS BY THE SECRETARY OF STATE IS CONCLUSIVE, AND NOT SUBJECT TO JUDICIAL REVIEW

Under Point I the Government has contended that the question of the validity of the sabotage awards is a political question, that the executive department has power to settle such questions apart from statute, and that the Settlement of War Claims Act was not intended to restrict the power enjoyed by the Secretary of State in the absence of a statute. The Government now contends in Point II that, even assuming the executive department has no such power apart from statute, the Settlement of War Claims Act was intended to confer it.

Admittedly the funds in the German Special Deposit Account are the property of the United States. *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 120–124. That the Congress has constitutional power to give finality to the determinations of the Secretary of State with respect to the amount and validity of any award cannot be doubted, Cf. *United States* v. *Babcock*, 250 U. S. 328; *Work* v. *Rives*, 267 U. S. 175. And such, we submit, was

the purpose and effect of the Settlement of War Claims Act.

The object of the statute was to discharge a "moral obligation," not to pay a legal debt (See Sen. Rept. 273, 70th Cong., 1st Sess., 69 Cong. Rec. 751, *et seq.*). Nowhere in the Act is there any provision expressly creating a private right in an American national. *Dismuke* v. *United States,* 297 U. S. 167, 169. And while the statute does not expressly foreclose judicial review,[14] the provisions of Sections 2 (a) and 2 (b), authorizing the Secretary of the Treasury to pay such awards as are certified by the Secretary of State, evidences the intention of Congress to give finality to the latter's determination. Cf. *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172; *Butte, Anaconda & Pacific Ry. Co.* v. *United States,* 290 U. S. 127.

In the *Great Northern Ry. Co.* case, *supra,* Congress had by Section 209 (c) of the Transportation Act, guaranteed a certain income to railway companies for a period of six months after the termination of federal control. Section 209 (g) provided that "the Commission [Interstate Commerce Commission] shall * * * ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing

[14] *Cf.* Section 8, which declares that decisions by the Secretary of the Treasury in respect of payments from the funds are "final and conclusive, and * * * not * * * subject to review by any other officer of the United States * * *."

guarantee * * *." Certification by the Commission was held to be conclusive. This Court said (pp. 182–183):

> The mere fact that the certificate may be conclusive, if it be a fact, would not entitle the Company to a judicial review. Compare *United States* v. *Babcock*, 250 U. S. 328, 331; *Work* v. *Rives*, 267 U. S. 175. We find no reason for thinking that because Congress confided to the Commission the task of certifying the amount to be paid to carriers from the public treasury, as an incident to the World War, it thereby consented that the United States should be sued in the special proceeding in equity devised long before to control the Commission's execution of its regulatory functions in enforcing the Interstate Commerce Act.

In *Butte, Anaconda & Pacific Ry. Co.* v. *United States, supra*, the Government, after payment to a carrier of a "deficit" during federal control, sought to recover the amount paid, because of the Commission's misconstruction of the term "deficit". Recovery was denied "because when Congress * * * imposed the duty to certify to the Treasury the amounts severally due to carriers, it required the Commission—and hence authorized it—to determine whether the claimant was entitled to relief". 290 U. S. at 136. And "since Congress has not provided a method of review, neither the Commission nor a court has power to correct the

alleged error after payment made pursuant to a certificate" (*ibid.*). See also *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.* 249 U. S. 451; *Silberschein* v. *United States*, 266 U. S. 221.[15]

These cases amply support the position of the Government in the case at bar. When Congress imposed the duty on the Secretary of State to certify awards of the Commission, it thereby authorized him to determine whether or not the United States should accept or reject any award. Cf. *Butte, Anaconda & Pacific Ry. Co.* v. *United States, supra*, at 136.[16] To hold otherwise would render Section 2 (a) of the Settlement of War Claims Act largely meaningless.

There is no substance in the suggestion (Brief of Petitioner in No. 381, pp. 37–38) that the Secretary of State has no function under the Act from

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[15] Similary, cases arising under the swamp-land grants have held the patents of the Secretary of Interior conclusive and final. *French* v. *Fyan*, 93 U. S. 169; *Heath* v. *Wallace*, 138 U. S. 573, 585; *Chandler* v. *Calumet & Hecla Mining Co.*, 149 U. S. 79, 92; *McCormick* v. *Hayes*, 159 U. S. 332.

[16] *Dismuke* v. *United States*, 297 U. S. 167, is not opposed. The *annuities* involved in that case were held not to be gratuities, but were composed in part at least from contributions by employees. 297 U. S. at 170. Moreover, the statute in that case created a right in the employee to the disability fund. "The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States." 297 U. S. at 169.

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which an inference of intention to commit the power of decision to him may be drawn. The Act was passed with reference to the Agreement of August 10, 1922, and, while the Agreement contemplated that the Commission should pass on all questions related to the claims presented, the Secretary of State necessarily was required to determine what claims should be submitted and whether, in the event of protest from Germany, any of the claims should be abandoned. The question, for example, whether the claims presented were within the jurisdiction of the Commission is one of the most common types of issues arising in connection with international arbitrations, and is a familiar subject of negotiation between the diplomatic representatives of the respective governments. If, notwithstanding the practice and precedents of almost a hundred and fifty years, it be assumed that the executive department has no power apart from statute to settle such questions by diplomacy, then the Settlement of War Claims Act should be construed to confer the necessary authority. These continually recurring questions must have been intended to be settled without recourse to the courts in the first instance, and since no provision was made for judicial review after an administrative determination of the executive department, it seems clear that Congress intended none. The petitioners' contention that any action of the Secretary of State would not be taken under the statute (Petitioner's Brief in No. 381, pp. 38–

39) thus either ignores the power of the Secretary apart from statute, as we argue under Point I, or misconceives the scope and effect of the Act. It may be, of course, that Congress intended the Commission or Umpire to make final disposition of every conceivable question, leaving nothing to be settled between the two Governments; but, if so, it is obvious that the Act precludes the petitioners from seeking judicial review of the issues here sought to be raised.

Nor is it material that no provision was made in the Act for hearing private individuals prior to certification by the Secretary. The Agreement, in accordance with established usage, provided that all claims should be presented through agents of the "two Governments," although it did not expressly forbid the Commission to hear argument by private counsel. The Government is, of course, under no obligation whatever to consult private claimants in connection with the presentation of claims on behalf of private individuals. See Borchard, *supra*, p. 371. If anything, the absence of provision for hearing private claimants brings into sharper focus the lack of standing of these petitioners to maintain the present proceedings.

We do not deny that the question of the ownership of claims as between private individuals may be determined in judicial proceedings. The Secretary of State has never sought to make final disposition of such questions, and, even if he should seek to do so, the equitable owner would not be precluded from asserting his rights in appropriate

judicial proceedings. The equitable owner may compel payment to himself even where Congress has appropriated a fund for payment to a beneficiary specifically named in the statute. *Houston* v. *Ormes*, 252 U. S. 469. But even in attachment proceedings, the validity of the claim attached must be assumed, and this question the present statute committed to the determination of the Secretary of State.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1940.

APPENDIX

The Agreement of August 10, 1922, between the United States and Germany, 42 Stat. 2200, provided:

The United States of America
and
Germany,

being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany,

and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Wirth, Chancellor of the German Empire,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The commission shall pass upon the following categories of claims which are more

particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They

may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V

Each Government shall pay its own expenses, including compensation of its own commissioner, agent, or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above-named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August 1922.

[SEAL] ALANSON B. HOUGHTON.
[SEAL] WIRTH.

Section 4 of the Settlement of War Claims Act of 1928, c. 167, 45 Stat. 254, 260, reads as follows:

SEC. 4. (a) There is hereby created in the Treasury a German special deposit account, into which shall be deposited all funds hereinafter specified and from which shall be disbursed all payments authorized by section 2 or 3, including the expenses of administration authorized under subsections (c) and (m) of section 3 and subsection (e) of this section.

(b) The Secretary of the Treasury is authorized and directed to deposit in such special deposit account—

(1) All sums invested or transferred by the Alien Property Custodian, under the provisions of section 25 of the Trading with the Enemy Act, as amended;

(2) The amounts appropriated under the authority of section 3 (relating to claims of German nationals); and

(3) All money (including the proceeds of any property, rights, or benefits which may be sold or otherwise disposed of, upon such terms as he may prescribe) received, whether before or after the enactment of this Act, by the United States in respect of claims of the United States against Germany on account of the awards of the Mixed Claims Commission.

(c) The Secretary of the Treasury is authorized and directed, out of the funds in such special deposit account, subject to the provisions of subsection (d), and in the following order of priority—

(1) To make the payments of expenses of administration authorized by subsections (c) and (m) of section 3 or subsection (e) of this section;

(2) To make so much of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), as is attributable to an award on account of death or personal injury, together with interest thereon as provided in subsection (c) of section 2;

(3) To make each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount thereof is not payable under paragraph (2) of this subsection and does not exceed $100,000, and to pay interest thereon as provided in subsection (c) of section 2;

(4) To pay the amount of $100,000 in respect of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of $100,000 and is not payable in full under paragraph (2) of this subsection. No

person shall be paid under this paragraph and paragraph (3) an amount in excess of $100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid. Pending the completion of the work of the Mixed Claims Commission, the Secretary of the Treasury is authorized to pay such installments of the payments authorized by this paragraph as he determines to be consistent with prompt payment under this paragraph to all persons on behalf of whom claims have been presented to the Commission;

(6) To pay amounts determined by the Secretary of the Treasury to be payable in respect of the tentative awards of the Arbiter, in accordance with the provisions of subsection(s) of section 3 (relating to awards for ships, patents, and radio stations);

(7) To pay to German nationals such amounts as will make the aggregate payments equal to 50 per centum of the amounts awarded under section 3 (on account of ships, patents, and radio stations). Pay-

ments authorized by this paragraph or paragraph (6) may, to the extent of funds available under the provisions of subsection (d) of this section, be made whether or not the payments under paragraphs (1) to (5), inclusive, of this subsection have been completed;

(8) To pay accrued interest upon the participating certificates evidencing the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld);

(9) To pay the accrued interest payable under subsection (c) of section 2 (in respect of awards of the Mixed Claims Commission) and subsection (h) of section 3 (in respect of awards to German nationals);

(10) To make such payments as are necessary (A) to repay the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld), (B) to pay amounts equal to the difference between the aggregate payments (in respect of claims of German nationals) authorized by subsections (g) and (h) of section 3 and the amounts previously paid in respect thereof, and (C) to pay amounts equal to the difference between the aggregate payments (in respect of awards of the Mixed Claims Commission) authorized by subsections (b) and (c) of section 2, and the amounts previously paid in respect thereof. If funds available are not sufficient to make the total payments authorized by this paragraph, the amount

of payments made from time to time shall be apportioned among the payments authorized under clauses (A), (B), and (C) according to the aggregate amount remaining unpaid under each clause;

(11) To make such payments as are necessary to repay the amounts invested by the Alien Property Custodian under subsection (b) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of the unallocated interest fund); but the amount payable under this paragraph shall not exceed the aggregate amount allocated to the trusts described in subsection (c) of section 26 of such Act;

(12) To pay into the Treasury as miscellaneous receipts the amount of the awards of the Mixed Claims Commission to the United States on its own behalf on account of claims of the United States against Germany; and

(13) To pay into the Treasury as miscellaneous receipts any funds remaining in the German special deposit account after the payments authorized by paragraphs (1) to (12) have been completed.

(d) 50 per centum of the amounts appropriated under the authority of section 3 (relating to claims of German nationals) shall be available for payments under paragraphs (6) and (7) of subsection (c) of this section (relating to such claims) and shall be available only for such payments until such time as the payments authorized by such paragraphs have been completed.

(e) The Secretary of the Treasury is authorized to pay, from funds in the German special deposit account, such amounts, not in excess of $25,000 per annum, as may be necessary for the payment of the ex-

penses in carrying out the provisions of this section and section 25 of the Trading with the Enemy Act, as amended (relating to the investment of funds by the Alien Property Custodian); including personal services at the seat of government.

(f) The Secretary of the Treasury is authorized to invest and reinvest, from time to time, in bonds, notes, or certificates of indebtedness of the United States any of the funds in the German special deposit account, and to deposit to the credit of such account the interest or other earnings thereon.

(g) There shall be deducted from the amounts first payable under this section to any American national in respect of any debt the amount, if any, paid by the Alien Property Custodian in respect of such debt which was not credited by the Mixed Claims Commission in making its award.

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